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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

TARGETED RESIDENTIAL PICKETING

INTRODUCTION

Councilmembers Scott Peters and Toni Atkins asked for the City Attorney's and City Manager's response to recent residential picketing that they believe violated the City's targeted residential picketing ordinance. The City Attorney and Chief of Police, on behalf of the City Manager, are responding in this memo.

LEGAL BACKGROUND

In 1993, the City Council adopted San Diego Municipal Code [SDMC] sections 52.2001-2003¹, referred to as the "Targeted Residential Picketing Ordinance." The ordinance makes it unlawful to picket before or about a residence. SDMC § 52.2003. The limited purpose of the ordinance is to preclude intrusion upon the privacy rights of the targeted residence. SDMC § 52.2001.

The ordinance is modeled after an anti-picketing ordinance adopted in Brookfield, Wisconsin, and upheld by the United States Supreme Court in *Frisby v. Shultz*, 487 U.S. 474, 487 (1988).² In making its determination, the Court reiterated the principle that a public street is a traditional public forum³ which does not lose its status as a public forum simply because it runs

¹See Attachment 1 for the full text of the ordinance.

²The Brookfield ordinance provides: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield."

³A "traditional public forum" is a place traditionally devoted to assembly and debate, and therefore the government's ability to ban or regulate speech in such a forum is sharply limited. *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 45 (1983).

through a residential neighborhood. *Id.* at 480. The Court also reiterated the importance of residential privacy and the unique nature of the home, stating that there is no right to force speech into the home of an unwilling listener. *Id.* at 484-485. The Court ultimately gave the ordinance a narrow construction to avoid constitutional difficulties. “[T]he ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence.” *Id.* at 482. Critical to the Court’s decision was the representation by the Town of Brookfield that general marching through residential neighborhoods, or even walking a route in front of an entire block of houses, was not prohibited by the ordinance. *Id.* at 483.

Despite what appears to be a clear pronouncement from the Supreme Court that the Brookfield ordinance is valid on its face,⁴ the courts are still grappling with similar versions of residential picketing ordinances. For example, in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995), the United States Court of Appeal for the Sixth Circuit struck down an ordinance modeled after the Brookfield ordinance. In contrast, in *City of San Jose v. Superior Court*, 32 Cal.App.4th 330 (1995), the Sixth District Court of Appeal for the State of California upheld an ordinance prohibiting targeted picketing within 300 feet of a residence, and in *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996), the United States Court of Appeals for the Eighth Circuit upheld an ordinance prohibiting targeted picketing in front of a residence and a house on either side of that residence. After eight years of litigation and three court opinions, the Eighth Circuit also upheld an ordinance almost identical to that in the Brookfield ordinance. *Veneklase v. City of Fargo*, 200 F.3d 1111 (8th Cir. 1999). As in the Brookfield case, the *Veneklase* court found it significant that Fargo’s ordinance allowed picketers to protest through neighborhoods, walk a route in front of a group of homes, and contact residents by telephone or in person with literature. *Id.* at 1117. The court stressed that the ordinance was narrowly tailored to address the “evil” of targeted picketing of a particular resident, citing *Frisby*. *Id.* at 1117.

Because the *Frisby* Court only considered a facial challenge to that ordinance, questions about the application of such ordinances remain. Subsequent court decisions have done little to clarify those issues. The Seventh Circuit, which heard the issues related to the application of the Brookfield ordinance following the Supreme Court decision in *Frisby* said the following:

We appreciate the plaintiffs’ concern that it is hard to tell when picketing is “directed at” a particular home. Will it be enough to go ‘round and ‘round the block? Could the picketers march in front

⁴ An ordinance may be unconstitutional “on its face,” meaning that it is unconstitutional in every conceivable application or is overbroad because it prohibits a broad range of protected activity. An ordinance may be unconstitutional “as applied” meaning that it is unconstitutional as applied to a particular person’s activity, even though it may be valid as to the activity of others. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796, 797, 803 (1984).

of the five houses on either side of the Victorias'? May they stop for one minute, or two, or five, in front of the Victorias' place before moving along? Surely they can't evade the law by standing in front of the Victorias' home and occasionally jumping one house on either side. How much longer must the route be? No matter how clear the ordinance seems, a hundred nice questions may follow in its wake. The Constitution does not require Brookfield to answer each of these before it may enforce the law. Incompleteness is a curse of language, as of human imagination. To say that precision is a precondition to enforcement is to say that no ordinance regulating speech may stand--a proposition the Supreme Court has rejected over and again.

Schultz v. Frisby, 877 F.2d 6, 8 (7th Cir. 1989)

Other questions that remain unanswered include whether the "target" must be home in order for a violation to occur; how the ordinance applies to apartment and condominium complexes; and how to evaluate the cumulative effect of the group behavior, i.e., are only those who are physically in front of the residence to be arrested, or those who participate in identifying the target?

What is clear from the cases is that enforcement of these types of ordinances must be a balance of the right of the protestors to engage in First Amendment activity, and the right of the resident to be free from unwanted speech in his or her own home.

FACTUAL BACKGROUND

Since the inception of the San Diego's ordinance, there have been residential protests, but the Police Department has been successful in gaining voluntary compliance with the ordinance and there have not been any arrests for targeted residential picketing. Although the most recent protests involve anti-abortion protestors, other protestors have engaged in such activity, including groups such as anti-fur groups and anti-drug groups. The following is a summary of recent residential picketing known to the San Diego Police Department.

Jackdaw Street, December 16, 2000, District 3

Approximately 100 anti-abortion protestors picketed on Jackdaw Street between 11:00 a.m. and 1:30 p.m. Some carried signs with the name and address of a doctor who lives on that street and allegedly performs abortions. Others carried signs of a more general nature. The picketers moved up and down the street. The San Diego Police Department was made aware of the group's intent to picket prior to the event, and maintained a presence throughout the event. There were no arrests, no requests for citizen arrests, and no complaints except for a couple of inquiries about the graphic nature of the signs depicting aborted fetuses. The doctor was not home.

Norma Drive, January 20, 2001, District 3

Approximately 20-30 anti-abortion protestors marched, sang and prayed around this cul-de-sac where a doctor who allegedly performs abortions lives. From approximately 10:15 a.m. to 12:30 p.m., they did laps around the cul-de-sac, carried signs that identified the doctor, used signs to point to his home, and used a bullhorn to identify the doctor. They also carried signs of a general nature protesting abortion. The bullhorn was also used to chant and pray about abortion and other religious principles. The doctor chose not to be home during the protest. The San Diego Police Department was made aware of the group's intent to protest prior to the event, and maintained a presence throughout the event. Two residents inquired about making citizen arrests for violations of the targeted residential picketing ordinance, but ultimately did not do so. The Police Department made no arrests, nor were any citizen arrests made.

Florey Street, February 17, 2001, District 1

On February 17, 2001, police were called to respond to protestors on Florey Street at approximately 12:30 p.m. When officers arrived, they found anti-abortion protestors preparing to leave the area. The protestors left the area shortly thereafter. The San Diego Police Department was not made aware of the protest prior to its occurrence. According to a resident, the resident observed the protest at about 11:30 a.m. He saw approximately 20 adults with signs, some of a general nature, and at least one sign identifying another resident who lives on the street and is associated with Planned Parenthood. The protestors moved down the street, and the resident left at approximately 11:45 a.m. The Police Department also learned that the protestors had leaflets identifying the Planned Parenthood member, his address, and describing him as an "abortion profiteer." Both the resident and the Planned Parenthood member, who was home for part of the time, observed one of the protesters videotaping residents, including occupants of the member's house, as they left their houses.

The San Diego Police Department has since been in contact with a member of this group and asked that the Department be informed of such protests ahead of time so that the rights of all citizens can be protected and to help avoid any unlawful confrontations between residents and protestors.

The City Attorney's Office has also been contacted by representatives of various anti-abortion groups and by representatives of Planned Parenthood to discuss protest issues, including targeted residential picketing. The City Attorney's Office and the Police Department are and have been open to hearing from all those affected and are committed to working with any group who wants to be law-abiding.

While the Police Department understands that a protest in one's neighborhood is disturbing to the peace and enjoyment of the neighborhood, the Department is not aware of any behavior at any of the three described protests constituting a serious threat to public safety. There was no evidence of any blocking of ingress or egress to any home or street, no threats of harm to any individual or threats of group violence, no claims of excessive noise, and no trespassing on private property.

CURRENT ACTION PLAN

When faced with protesters in residential neighborhoods, the Police Department's experience is that an appropriate police presence is the best deterrent to unlawful activity. The Police Department's goal is to gain the voluntary compliance of the protestors with all applicable laws. The targeted picketing ordinance is one of several tools used by the Department in order to keep the protest peaceful and lawful. Other tools include Penal Code sections 415 (disturbing the peace), 408 (unlawful assembly), and 647 (obstructing a street or sidewalk).

If a protest appears peaceful and there are no citizen complaints, the officers generally monitor the protest. If a citizen requests that a citizen arrest be made, arrests are made. If the officers observe damage to property, or a threat to persons, arrests are made without a complaining victim/witness.

It has been the experience of the Police Department that keeping open lines of communication with protest groups results in a safer event for both the protesters and those in the affected area. The Police Department encourages groups to inform the Department of their protest activity, as confrontations between residents and protesters is a concern and can be handled more effectively with prior notice to the Department. The Police Department has found that aggressive enforcement in the absence of citizen complaints dissuades groups from talking to and working with the Department.

In contrast to other cities, the Department has been successful in working with protest groups to maintain order. The Department believes this is due to maintaining open lines of communication, aggressively enforcing crimes involving damage to property, threats to persons, and blockading or interfering with others' rights to move about freely, and keeping voluntary compliance as the primary goal.

With respect to enforcement of the targeted residential picketing ordinance, the City Attorney's Office has been and continues to work closely with officers when they encounter such an event. The application of the ordinance must be determined on a case-by-case basis. There is a training bulletin on this subject which was issued in 1999. The City Attorney's Office continues to work with the Police Department to provide clearer guidance on the subject, and is currently working with the Department to amend the training bulletin.

The Criminal Division of the City Attorney's Office will evaluate any case submitted under this ordinance and is willing to prosecute any violation for which there is probable cause to believe that a crime has been committed, and there is a reasonable likelihood of conviction.

Respectfully submitted,

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CASEY GWINN
City Attorney

/ S /

DAVE BEJARANO
Chief of Police

MTN:jp:520.1

Attachments

cc: The Honorable Dick Murphy, Mayor
Councilmember Byron Wear, District 2
Councilmember George Stevens, District 4
Councilmember Brian Maienschein, District 5
Councilmember Jim Madaffer, District 7
Councilmember Ralph Inzunza, District 8

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